Chaim Babad, Bernard Steinmetz and Emanuel Steinmetz, a Co-Partnership d/b/a J.R.R. Realty Co., and Holland House Tenants Corporation, Additional Respondent *and* Local 32B-32J, Service Employees International Union, AFL–CIO. Cases 29–CA–8809 and 29–CA–8880

January 31, 1991

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND OVIATT

On January 10, 1990, Administrative Law Judge Steven Davis issued the attached supplemental decision. The General Counsel, the Union, and the Respondents filed exceptions and supporting briefs. The Union filed an answering brief to the Respondents' exceptions, and the Respondents filed a letter brief in response to the Union's and the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] only to the extent consistent with this Supplemental Decision and Order.

1. The judge failed to find that the Respondents[3] must make contributions to Local 32B's pension fund on behalf of the discriminatees. The General Counsel excepts, contending that the Board's Order and the terms of Local 32B's collective-bargaining agreement require the Respondents to make contributions to Local 32B's pension fund on behalf of the discriminatees during their backpay periods.[4] We agree.

In the underlying unfair labor practice proceeding,[5] the Board ordered Respondent J.R.R. Realty Co. (J.R.R.) to ''[h]onor and give retroactive effect . . . to the terms and conditions of the collective-bargaining contract with the Union, including payment of wages and benefits as prescribed.''[6] The Board also ordered the Respondent to offer reinstatement to the six discriminatees and make them whole for any loss of earnings and other benefits resulting from their discharge. The Local 32B collective-bargaining agreement requires the Respondent to make contributions to the pension fund on behalf of its employees. Accordingly, we find, pursuant to the Board's Order, that the Respondents must make payments to the Local 32B pension fund on behalf of the discriminatees as set forth in appendix G of the amended backpay specification.[7]

2. The judge found, and we agree, that replacement employees who were employed after January 1, 1989,[8] are entitled to Local 32B contractual wages and benefits. The General Counsel excepts to the judge's failure to grant replacement employee Anthony Falcone Local 32B contractual wages and benefits for his period of employment after January 1, 1989.[9] The General Counsel argues that the backpay specification shows Falcone's date of hire as February 4, 1984, and does not show any date of termination because Falcone was still employed as of the date of the hearing. According to the General Counsel, the judge assumed that Falcone's employment had terminated prior to the hearing because he did not testify at the hearing, unlike the other replacement employees.[10] We agree with the General Counsel that replacement employee Anthony Falcone, whom the Respondents do not dispute

[1] The judge found that the Respondents were required to pay interest to the Local 32B health and pension funds in addition to liquidated damages. We note that interest is required pursuant to language in the Local 32B collective-bargaining agreement and the funds' trust agreements.

The judge made an error in totaling the amount the Respondents owed the Local 32B pension fund. In light of our findings concerning the contributions owed to the health and pension funds, we have recalculated the total amounts due.

[2] In agreeing with the judge that the parties' negotiations did not result in a good-faith impasse, we additionally rely on the Respondents' pervasive and widespread unremedied unfair labor practices including discharge of the entire bargaining unit and repudiation of the contract. In view of the breadth and severity of these violations, and the substantial period in which they remained unremedied, we will not permit the Respondents to ''parlay an impasse resulting from [their] own misconduct . . .'' *Wayne's Dairy*, 223 NLRB 260, 265 (1976). See also *White Oak Coal Co.*, 295 NLRB 567 (1989).

[3] Holland House Tenants Corporation is an additional Respondent.

[4] The General Counsel's compliance specification did not seek Local 32B health fund contributions on behalf of the discriminatees.

[5] 273 NLRB 1523 (1985), enfd. 785 F.2d 46 (2d Cir. 1986).

[6] 273 NLRB at 1529.

[7] Relying primarily on *Coletti Color Prints*, 204 NLRB 647, 648 (1973), the Respondents deny any obligation to make contributions to the Local 32B pension and health funds. *Coletti* held that in the absence of proof of employee losses, the respondent was not obligated to make unlawfully withheld fringe benefit fund payments. However, the Respondents do not cite the Board's subsequent adoption of administrative law judges' decisions in *Pacific Aggregates*, 231 NLRB 214, 221–222 (1977), and *Argano Electric Corp.*, 248 NLRB 352, 360–361 (1980), which significantly limited the scope of *Coletti*. In these later cases, it was noted that 2 years after *Coletti* the Board decided *Stanwood Thriftmart*, 216 NLRB 852, 854 (1975), enf. denied on other grounds 541 F.2d 796 (9th Cir. 1976), which held, seemingly inconsistently with *Colleti*, that the appropriate remedy for the unfair labor practice of discontinuing contributions to union welfare and pension trust funds is reinstating the status quo ante, i.e., paying all past due welfare and pension contributions. Assuming that *Coletti* survived the later decision in *Stanwood Thriftmart*, the Board in *Pacific Aggregates* and *Argano Electric* limited *Coletti* to its specific facts, noting that *Coletti* involved a collective-bargaining agreement with a union which lost a Board election after the agreement expired and, further, involved school and medical insurance funds from which the employees could benefit only during the life of the contract which required such payments. As in *Pacific Aggregates* and *Argano Electric*, and in contrast to *Coletti*, the Union here continues to be the employees' bargaining representative and the unit employees have an interest in the continuance of the funds and their financial stability. Accordingly, for the reasons stated in *Pacific Aggregates* and *Argano Electric*, we find no merit in the Respondents' contention. See generally *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981).

[8] Backpay claims for replacement employees for periods prior to January 1, 1989, had been resolved by the parties prior to the hearing.

[9] In his supplemental decision, the judge listed Anthony Falcone as a replacement employee and stated that there was no testimony concerning when he left the Respondents' employ.

[10] The General Counsel argues that the other replacement employees testified because the Respondents had questioned their days and hours of employment prior to January 1, 1989. The General Counsel contends that Falcone's testimony was unnecessary because the Respondents did not question Falcone's days and hours of employment prior to January 1, 1989.

was employed by the Respondents at the time of the hearing, should receive Local 32B contractual wages and benefits for his period of employment after January 1, 1989.

3. We agree with the judge that the Respondents must make contributions to the Local 32B pension and health funds on behalf of the replacements.[11] We disagree, however, with the judge's finding that the Respondents should be required to pay only those increases provided for in the 1981 Commercial Building Agreement. Rather, we find that the Respondents must pay the increases up to and including the rates set forth in the 1984 Commercial Building Agreement.

The judge examined the parties' 1979 contract[12] and rejected the General Counsel's argument that the contract required the Respondents to pay contribution increases to those funds as set forth in succeeding commercial building agreements.[13]

The judge noted that the language of the 1979 contract contemplated that the increased contribution amounts were to be raised only as set forth in the 1981 Commercial Building Agreement or its successor. The judge accordingly found that the 1979 contract's reference to the 1981 Commercial Building Agreement indicated that the Respondents had agreed that on the effective date of the 1981 Commercial Building Agreement, the Respondents became responsible for the increased amounts of fund contributions set forth in the 1981 Commercial Building Agreement. However, the judge further found that the contract's usage of the disjunctive ''or'' in reference to any successor agreement to the 1981 Commercial Building Agreement precluded the Respondent from being obligated to provide any additional increases as set forth in such successor agreements. Such an interpretation, the judge found, would only have been justified had the phrase used been ''the 1981 Commercial Building Agreement (*and* its successor).''

The Union excepts, arguing that the Respondents should be required to pay the increases contained in all the commercial building agreements past 1981 and that the judge's decision to limit fund contributions to 1981 rates is not supported by the facts. The Union contends that Local 32B's collective-bargaining agreement requires contributions to the pension and health funds and that these contributions must be increased to match any increases required under the 1981 Commercial Building Agreement or its successors. The Union maintains that language in the Local 32B contract was intended to mean that the contract continue in full force and effect after its ''technical expiration.'' The Union argues that the Local 32B contract provides that any increases in the pension and health rates are to be passed along to contributing employers regardless of the effective date of those increases.[14]

We agree with the Union that the Respondents' obligation to make fund contributions should not be limited to the rates in effect in 1981. We do not agree, however, with the Union's contention that the Respondents should be required to pay the increases contained in all the commercial building agreements past 1981. Instead, we find that the Respondents must pay the increases up to and including the rates set forth in the 1984 Commercial Building Agreement.

The 1979 Local 32B contract provides that the employer must increase contributions in the same manner as contributions are increased in the ''1981 Commercial Building Agreement (or its successor).'' In interpreting the language of the 1979 contract, the judge failed to adequately address the ''or its successor'' language. We conclude, based on the language of the contract, that the parties intended that the employer make fund contributions pursuant to the 1981 Commercial Building Agreement during its terms and thereafter make the fund contributions required by its immediate successor, the 1984 Commercial Building Agreement. The judge's construction of the phrase ''(or its successor)'' deprives it of any practical significance.

We reject the Union's argument that the language of the 1979 Local 32B contract requires the Respondents to pay the increases contained in all the commercial building agreements past 1981. Such an interpretation

[11] In affirming the judge's finding that the Respondents be required to make contributions into these funds regarding ''six positions,'' we find no merit in the Respondents' contention that this level of contributions is excessive to the extent that there were at any time no more than four replacements employed. The requirement that funding be maintained for six positions, as requested by the General Counsel, is warranted in order to ensure the actuarial soundness of the funds. We further note that to the extent that pension fund contributions are required for both the replacements and the original discriminatees, this increased level of funding is warranted due to the coverage of both groups of employees, in addition to the need to maintain the soundness of the pension fund.

[12] Art. X, sec. 40, par. (D)(2) of the parties' collective-bargaining agreement states:

> Any contributions and benefits required hereunder shall be increased by any amount in the same manner as contributions and benefits may be increased in the 1981 Commercial Building Agreement (or its successor) between the Union and the RAB [Realty Advisory Board] and if service fees are required to be paid, the same fees shall be required to be paid hereunder.

Art. VI, par. 1(d) of the parties' 1979 collective-bargaining agreement also states:

> Upon the expiration date of this agreement . . . [it] shall thereafter continue in full force and effect for an extended period until a successor agreement shall have been executed. During the extended period, all terms and conditions hereof shall be in effect . . . .

[13] The commercial building agreements are collective-bargaining contracts which ran from January 1981 through December 1983; January 1984 through December 1986; and January 1987 through December 1989.

[14] The Union additionally argues that even if the judge was correct in interpreting the 1979 contract to mean that the Respondents are not required to pay the increased costs of the health and pension coverage, the Board should still require the Respondents to pay these increased costs. The Union notes that part of the Board's mandate is to ''make whole'' those adversely affected by unfair labor practices. The Union argues that if the judge's decision stands in this matter, the health and pension funds would be obligated to provide the Respondents' employees with benefits even though the Respondents are not required to pay the corresponding increased costs of the benefit. Therefore, the Union contends that the Respondents should be obligated to make the employees whole by making all contribution increases to the health and pension fund for all periods from 1981 to the present.

of the parties' 1979 contract would require a finding that the contract obligated the employer to increase fund contributions to the 1981 Commercial Building Agreement or its successors. As that interpretation goes beyond the clear meaning of the contractual language at issue here which clearly limited the parties' obligation to a single successor contract, requiring Respondents to apply the terms of more than one successor would amount to making a new contract for the parties and would violate the Supreme Court's holding in *H. K. Porter v. NLRB*, 397 U.S. 99 (1970), that the Board has no authority to compel agreement as to any substantive provision in a collective-bargaining contract.[15] Accordingly, we have recalculated the amounts due to the health and pension funds and the corresponding liquidated damages[16] owed by the Respondents below.

Contributions Due to the Pension and Health Funds

Concerning the rates of contributions to the health fund, the 1981 Commercial Building Agreement provides that effective January 1, 1981, the employer shall contribute to the fund $660 per year per employee. That contract further states that effective January 1, 1982, the employer shall contribute $712 per year per employee, and effective January 1, 1983, the employer shall contribute $816 per year per employee. The 1984 Commercial Building Agreement provides that effective January 1, 1984, the employer shall contribute $1540 per year for each employee and that effective January 1, 1985, the employer contribution to the fund shall be $1693 per year for each employee.

Concerning the rates of contributions to the pension fund, the 1981 Commercial Building Agreement provides that effective January 1, 1981, the employer shall contribute to the fund $11 per week per employee. The contract further states that effective January 1, 1982, the employer shall contribute $12 per week per employee. The 1984 Commercial Building Agreement provides that effective January 1, 1985, the employer shall contribute to the fund $13.95 per week per employee. The contract further states that effective January 1, 1986, the employer shall contribute $15.55 per week per employee.

Regarding the amounts of liquidated damages to be paid to the Union's funds, the health and pension funds trust agreements provide that if contributions are more than 50 days late, a charge of 2.5 percent is applied to the unpaid principal. That charge is retroactive to the first date the contribution was due. This formula has been used to compute the liquidated damages below.

Year	*Qtr.*	*H.F. Cont.*	*H.F.L.D.*	*P.F. Cont.*	*P.F.L.D.*[17]	*Percent*
1981	2	[18] $990.00	$2,301.75	[19] $858.00	$1,994.85	232.5
	3	990.00	2,227.50	858.00	1,930.50	225.0
	4	990.00	2,153.25	858.00	1,866.15	217.5
1982	1	[20] 1,068.00	2,242.80	[21] 936.00	1,965.60	210.0
	2	1,068.00	2,162.70	936.00	1,895.40	202.5
1982						
	3	1,068.00	2,082.60	936.00	1,825.20	195.0
	4	1,068.00	1,997.16	936.00	1,755.00	187.5
1983	1	[22] 1,224.00	2,203.20	936.00	1,684.80	180.0
	2	1,224.00	2,111.40	936.00	1,614.60	172.5
	3	1,224.00	2,019.60	936.00	1,544.40	165.0
	4	1,224.00	1,927.80	936.00	1,474.20	157.5

[15] We find no merit in the Union's contention that, as part of a make-whole remedy, the Respondents should be required to make contribution increases to which they did not agree.

[16] We adopt the judge's finding that language in the Local 32B collective-bargaining agreement and the funds' trust agreements allow for the payment of liquidated damages to the funds. We further note that, according to the Local 32B contract, the funds' trustees may impose liquidated damages in their discretion. We therefore find that if the funds' trustees in their discretion decide not to impose liquidated damages, we will not require the Respondents to pay these damages.

Unlike his colleagues, Member Oviatt would not award the funds liquidated damages in this case. Contrary to the cases on which the judge relies, Member Oviatt's view is that liquidated damages are neither mandated here under the terms of the applicable collective-bargaining agreement nor the trust agreements, nor is there affirmative record evidence that the trustees exercised their ''sole and absolute discretion'' to impose this penalty on the Respondents. In these circumstances, Member Oviatt finds the imposition of liquidated damages unwarranted.

[17] These figures constitute contributions for six positions. The abbreviations are as follows:

H.F. Cont.—Health fund contributions

L.D.—Liquidated damages

P.F. Cont.—Pension fund contributions.

[18] The 1981 Health Fund Contributions are computed as follows:

The 1981 Commercial Building Agreement requires contributions of $660 per year per employee, effective January 1, 1981. The quarterly amount is $165 per employee. $165 times six positions equals $990.

[19] The 1981 Pension Fund Contributions are computed as follows:

The 1981 Commercial Building Agreement requires contributions of $11 per week per employee effective January 1, 1981. $11 per week times 6 positions times 13 weeks per quarter equals $858.

[20] The health fund contributions were increased to $712 effective January 1, 1982.

[21] The pension fund contributions were increased to $12 effective January 1, 1982.

[22] The health fund contributions were increased to $816 effective January 1, 1983.

Year	*Qtr.*	*H.F. Cont.*	*H.F.L.D.*	*P.F. Cont.*	*P.F.L.D.*[17]	*Percent*
1984	1	[23]2,310.00	3,465.00	936.00	1,404.00	150.0
	2	2,310.00	3,291.75	936.00	1,333.80	142.5
	3	2,310.00	3,118.50	936.00	1,263.60	135.0
	4	2,310.00	2,945.25	936.00	1,193.40	127.5
1985	1	[24]2,539.50	3,047.40	[25]1,088.10	1,305.72	120.0
	2	2,539.50	2,856.93	1,088.10	1,224.11	112.5
	3	2,539.50	2,666.47	1,088.10	1,142.50	105.0
	4	2,539.50	2,476.01	1,088.10	1,060.89	97.5
1986	1	2,539.50	2,285.55	[26]1,212.90	1,091.61	90.0
	2	2,539.50	2,095.08	1,212.90	1,000.64	82.5
	3	2,539.50	1,904.62	1,212.90	909.67	75.0
	4	2,539.50	1,714.16	1,212.90	818.70	67.5
1987	1	2,539.50	1,523.70	1,212.90	727.74	60.0
	2	2,539.50	1,333.23	1,212.90	636.77	52.5
	3	2,539.50	1,142.77	1,212.90	545.80	45.0
	4	2,539.50	952.31	1,212.90	454.83	37.5
1988	1	2,539.50	761.85	1,212.90	363.87	30.0
	2	2,539.50	571.38	1,212.90	272.90	22.5
	3	2,539.50	380.92	1,212.90	181.93	15.0
	4	2,539.50	190.46	1,212.90	90.96	7.5
		$62,010.00	$60,438.94	$32,713.20	$36,574.14	

ORDER

The National Labor Relations Board orders that the Respondents, Chaim Babad, Bernard Steinmetz and Emanuel Steinmetz, a co-partnership d/b/a J.R.R. Realty Co., and Holland House Tenants Corporation, Additional Respondent, Forest Hills, New York, their officers, agents, successors, and assigns, shall

1. Make contributions to Local 32B-32J's pension fund on behalf of the discriminatees as set forth in appendix G of the amended backpay specification.

2. Make whole each of the employees who were employed on and after April 1, 1981, including, but not limited to, Anthony Falcone, Peter Berisha, Albert Gordon, and Colin Wayneschloss, at the building located at 73-37 Austin Street, Forest Hills, New York, now known as Holland House, by paying such employees (called replacement employees) such sums of money plus interest[27] which they are entitled to for wages, holidays, vacation, birthdays, and sickness benefits, as set forth in the judge's supplemental decision, for the period after January 1, 1989.

3. Pay to the Local 32B-32J pension fund the sum of $69,287.34 plus interest which represents the amount owed from April 1, 1981, to December 31, 1988. Pay to the Local 32B-32J health fund the sum of $122,448.94 plus interest which represents the amount owed from April 1, 1981, to December 31, 1988.

[23] The health fund contributions were increased to $1540 effective January 1, 1984.

[24] The health fund contributions were increased to $1693 effective January 1, 1985.

[25] The pension fund contributions were increased to $13.95 effective January 1, 1985.

[26] The pension fund contributions were increased to $15.55 effective January 1, 1986.

[27] Interest shall be computed pursuant to *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Kathleen M. Troy, Esq., for the General Counsel.
Morris Tuchman, Esq., of New York, New York, for the Respondents.
Ira A. Sturm, Esq. (Manning, Raab, Dealy & Sturm, Esqs.), of New York, New York, for the Union.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. On January 22, 1985, the National Labor Relations Board (the Board) issued its Decision and Order in the above cases, which was published at 273 NLRB 1523, which directed Chaim Babad, Bernard Steinmetz and Emanuel Steinmetz, a co-partnership d/b/a J.R.R. Realty Co. (J.R.R.) and its officers, agents, successors, and assigns, to, inter alia:

> (a) Honor and give retroactive effect from April 1, 1981, to the terms and conditions of the collective-bargaining contract with Local 32B-32J, Service Employees International Union, AFL–CIO (Union), including payment of wages and benefits as prescribed; and
>
> (b) Offer reinstatement to six named discriminatees, Ezekiel Correa, Gilberto Concepcion, Lorenzo Cruz, Charles Darmendo, Curtis Phillip and Hugh Robertson, and make them whole for any loss of earnings and other benefits resulting from, their discharge.

On March 4, 1986, the United States Court of Appeals for the Second Circuit entered its judgment enforcing in full the Decision and Order of the Board, published at 785 F.2d 46. On October 6, 1986, the United States Supreme Court denied Respondents' petition for a writ of certiorari.

A controversy arose over the amount of backpay due to the six discriminatees, and the amounts, if any, owed to the replacement employees, and to certain fringe benefit funds on their behalf. Whereupon, the Regional Director for Region 29 issued a backpay specification and notice of hearing on May 28, 1987, against the above-named Respondents, and an Amended Backpay specification and notice of hearing on July 5, 1988, against the above-named Respondents and Holland House Tenants Corporation, additional Respondent (Respondents) which set forth the amounts of backpay alleged to be due the discriminatees, the replacement employees and the amounts allegedly owed to the fringe benefit funds on their behalf.[1]

Thereafter, Respondents filed an answer in which they denied certain allegations of the specification and made certain affirmative defenses.

A hearing was held before me in Brooklyn, New York, on October 11, 26, and 27, November 16, and December 6, 1988, and was closed by order on December 22, 1988. Following the hearing, briefs were received from all parties.

On April 7, 1989, counsel for General Counsel filed a motion which stated that the parties have settled certain claims set forth in the amended backpay specification as follows:

> The parties' settlement resolves the backpay claims of the discriminatees and their replacements as alleged in Amended Appendices A through F, and Appendices H through Q.

The motion further stated that the parties' settlement does not resolve the:

> (a) claims of the replacement employees for wages, holidays, vacation, birthdays or sick pay for the period after January 1, 1989.
>
> (b) claims for contributions owed to the Building Service Local 32B-32J, Pension and Health Funds on behalf of the discriminatees and their replacements as alleged in Appendix G, and Appendices R and S of the Amended Backpay Specification.[2]
>
> (c) claim of employee Colin Wayneschloss, or the claims of any employees hired after January 1, 1989.

General Counsel accordingly moved that I approve her request for withdrawal of amended appendices A through F, and appendices H through Q of the amended backpay specification.

No opposition has been filed to General Counsel's motion, and it is accordingly granted.

This supplemental decision is based on the entire record including the briefs and my observation of the demeanor of the witnesses.[3]

[1] The amended backpay specification was further amended at the hearing to include, as relevant here, in G.C. Exh. 4, an amendment to Appendix G, the computation of the contributions to the Building Service 32B-32J Pension Fund.

[2] The motion did not mention appendix S. However, it is clear that inasmuch as the motion did mention the health funds, which calculations are set forth in appendix S, that appendix S was intended to be included. Moreover, General Counsel's brief, filed before the Motion, urges consideration of Appendix S.

[3] The Union filed a motion to correct transcript. The motion was joined in by General Counsel. No opposition to it has been filed. The corrections to the transcript, as so moved, are granted, and they appear in the appendix.

I. BACKGROUND

In the underlying unfair labor practice proceeding, it was found that at the time that J.R.R. purchased the apartment building known as Holland House on March 31, 1981, its six employees had been represented by the Union, which had a collective-bargaining agreement with the predecessor of J.R.R. The contract was dated August 27, 1979, and was effective until April 20, 1982. J.R.R. discharged the six employees, refused to honor the collective-bargaining agreement, hired replacements, and reduced the number of employees in its work force.

The Board found that at the time that J.R.R. purchased the building, it had adopted the collective-bargaining contract with the Union, and was obligated to honor it, and accordingly ordered J.R.R. to honor and give retroactive effect from April 1, 1981, to the terms and conditions of that agreement, including the payment of wages and benefits as prescribed. The Court of Appeals held that ''J.R.R., having assumed its predecessor's labor contract, was bound to abide by the terms of that contract.''

Respondents admitted the following, in relevant part, by virtue of their answer to the amended backpay specification:

> (a) From March 31, 1981 to about June 15, 1984, Chaim Babad, Bernard Steinmetz and Emanuel Steinmetz, a co-partnership d/b/a J.R.R. Realty Co., had maintained its principal office and place of business at 284 Hewes Street, Brooklyn, New York, where it was, and has been engaged in the ownership, rental and management of apartment units.
>
> (b) From on about June 15, 1984 to the present, Holland House Tenants Corporation, has maintained its principal office and place of business at 284 Hewes Street, Brooklyn, New York, where it is, and has been engaged in the ownership, management and sales of apartment units.
>
> (c) Within the knowledge of J.R.R. and Holland House, Respondent Holland House in about May, 1984, acquired from J.R.R. the land and building at issue herein, and since that date has continued to operate the business of J.R.R. in basically unchanged form.[4]
>
> (d) Prior to the acquisition by Holland House of the building herein, Holland House was on notice of the potential liability of J.R.R. in these Board cases, through Chaim Babad who was a partner in J.R.R. and who also is the majority shareholder in Holland House.
>
> (e) Holland House has continued the employing entity with notice of the potential liability of J.R.R. to remedy its unfair labor practices, and is a successor of J.R.R.

The Current Dispute

There has been an exchange of correspondence and two meetings between the parties, which sets the stage for this hearing and the arguments of the parties. Accordingly, they have been set forth here in relevant part.

On April 7, 1986, Union Attorney Ira Sturm wrote to Chaim Babad, a principal of J.R.R. Realty, requesting that he

[4] The date that Holland House acquired the building was alleged as about May 15, 1984. That date has not been admitted by Respondents, but they concede in their brief that Holland House commenced operations in June 1984.

''immediately institute all the terms and conditions of employment as set forth in the collective bargaining agreement under which the [Second Circuit Court of Appeals] has found you to be obligated. Sturm also requested certain information regarding the wages and benefits of employees.

On November 14, 1986, Sturm wrote to Morris Tuchman, Respondent's attorney, demanding that ''all terms of employment as contained in the 1981 Independent Apartment House Agreement be adhered to prospectively for all current unit employees. Thus, it is demanded that all wages be paid, benefits applied, and contributions to the welfare and pension fund be paid on behalf of current employees. (Past monies owed can be dealt with either through mutual agreement, arbitration or through the NLRB's compliance machinery.)'' Sturm asked that Tuchman contact him so that ''arrangements can be made to restore the status quo and commence negotiations.''

On January 23, 1987, Sturm, having been told by Tuchman to write to Babad directly, sent him a letter requesting that J.R.R. ''comply prospectively with the benefits and wage schedule of the 1979 Independent Apartment House Agreement, Which you assumed,'' and also requested certain information.

On March 11, 1987, Tuchman wrote to Sturm, stating that Babad is ''prepared to meet and negotiate with the [Union] on the terms of a collective bargaining agreement.''

On March 13, 1987, Sturm wrote to Tuchman, confirming a meeting to be held on March 25. Sturm wrote that the Union ''is entitled to a restoration of the status quo as had been in existence prior to the unlawful breach of contract by your client.'' Sturm stated that J.R.R. must restore the complement of employees to six, who ''must be paid at the last contract rate in effect and each must have fund benefits paid on his behalf for all periods retroactive to the breach. . . . Also any current or replacement employees must likewise be made whole by payment to them in the difference in the contract rates and what they were paid, as well as any benefits.''

On March 17, Tuchman wrote to Sturm, stating that the building was now owned by a cooperative corporation, and that J.R.R. Realty no longer owns it. Tuchman further advised that he believed that the corporation is substantially liable for remedying the unfair labor practices of its predecessor, and proposed leaving such compliance issues regarding the successor to the Board. He also noted that the corporation is prepared to pay the rates under the old agreement and to commence fund payments for the employees.

On March 25, 1987, a 1-hour meeting was held. Present were Sturm, Tuchman, Babad, and others. Sturm requested the information that he had previously asked for and which he had not yet received. Some of the information was supplied at that time.

Sturm stated that the purpose of the meeting was not to negotiate, but rather to discuss the return of the conditions as they had existed prior to the commission of the unfair labor practices—a return to the status quo ante. It was Sturm's view that once conditions had been restored negotiations would then begin.

At the meeting Sturm objected to the fact that only four employees were working at the building whereas prior to the commission of the unfair labor practices six had been employed. As to two current employees, Sturm noted that one was working 4 days per week and the other in excess of 40 hours per week, which changes were made unilaterally, in violation of the contract. Babad sought to explain those changes, but Sturm insisted that the status quo must be restored before any changes were made. The meeting ended when Sturm requested that Respondent notify him when it complied with the contract and remedied the unfair labor practices.

The following day, Tuchman sent a letter to Regional Director Alvin Blyer in which he advised him that Holland House would immediately implement the terms of the 1981 collective-bargaining agreement, and pay the wages and benefits provided in that contract. He further noted that in restoring the 1981 employee complement at the 1981 rates the current workers will lose overtime and additional pay. He also offered to bargain concerning future terms.

On March 31, Sturm wrote to Tuchman, advising that Holland House's reduction of the number of employees to four and its plan to reduce their pay violate the parties' contract. Sturm further noted the amounts allegedly due to the Health Fund and Pension Fund, from 1981 to date. It was Sturm's belief that Respondents' continue to be liable to the Funds.

On April 7, Tuchman replied to Sturm's letter. Tuchman denied that Holland House had any fund liability beyond the 1982 expiration of the 1979 collective-bargaining agreement.

Shortly thereafter, Tuchman offered to make fund contributions for four employees at the 1982 rates. Sturm advised that those rates could not purchase the welfare package in 1987 since the rates had increased since 1982. Sturm told Tuchman that if Holland House sent the funds at the 1982 rates, the funds would not credit it for the current contribution amount owed. Rather, that money would be used to pay such sums owed retroactively from 1981, which according to Sturm was then about $166,766.

On April 9, Tuchman sent Sturm two checks payable to the Pension and Health Funds for the four current employees, for the period April 1 to June 30, 1987. The payments were made at the 1982, and not the current, rates. Those sums were sent by Sturm to the funds, with instructions that they be applied to the oldest amounts (the arrearages) owed, and not applied to current sums owed. Thereafter, Tuchman wrote to Sturm, requesting that the Union permit Respondents to provide health coverage to the current employees or that the sums sent be applied to the current workers.

On April 13, Sturm wrote to Tuchman, stating that the parties' 1979 contract's fund provisions continued in effect notwithstanding that contract's expiration in 1982.

On April 16, Tuchman wrote to Sturm, stating that it was his belief that Respondents are not responsible for increases in contributions after the contract expired.

The parties met on May 21, 1987, for 30 to 60 minutes. Present were Sturm, Tuchman, Babad, and Peter Lichtenthal, a member of the board of directors of Holland House.

Sturm stated that he was asked to present proposals for a new contract. He replied that the Union was not obligated to bargain until Respondents' restore the conditions to that existing prior to the commission of the unfair labor practices. They discussed a prospective contract, and measures to remedy the past violations. Sturm offered Respondents two options: accept the current standard industry apartment house collective-bargaining agreement or negotiate with the Union for a separate contract. Babad stated that he wished to nego-

tiate a new contract, and the Union agreed. At that meeting, the Union made proposals for a new aqreement.

The parties discussed the issue of medical coverage for the current employees. Babad stated that he wanted to provide some medical coverage through the Union, but did not wish to purchase the entire union plan, which was more extensive than what he sought, nor did he wish to pay for the full plan. He asked Sturm if the Union would provide coverage at a lower cost. Sturm replied that the Union's Welfare Fund has one plan, which is available at the current rate. He told Babad that Respondents could not purchase only part of the fund's plan. Sturm refused to provide lesser coverage at a lower cost and suggested that Babad find his own insurance.

Respondents then proposed to accept the current standard apartment house contract with two modifications: (1) that no discharge be effective without the consent of the Union or a finding of an arbitrator that there had been just cause for the dismissal and (2) that the wages paid to the employees be less than that provided in the contract. Sturm rejected that proposal and the meeting ended.

Lichtenthal's version of the meeting is essentially similar to Sturm's. He stated that Sturm said, in effect, that he wanted the status quo restored before negotiations began, and that it was not fair for the Union to be forced to negotiate from a position of weakness. Lichtenthal stated that Sturm gave Respondents the choice of accepting the current, standard apartment house contract or negotiating a new contract. Lichtenthal stated that Babad would never agree to the current wage rates as set forth in the current apartment house agreement, and Lichtenthal proposed that the wage rates be modified from the standard rates. According to Lichtenthal, Sturm said he would send Respondents a proposal concerning wages and benefits in about 1 week. Such a proposal was never received.

Tuchman asked that Respondents be permitted to implement medical coverage for the current workers, and Babad offered to buy current medical coverage from the Union at the 1981 contract rate. Lichtenthal did not recall Sturm's reply, but he did recall Sturm saying that (a) medical coverage must be provided by the Union, and Respondents could not provide such coverage and (b) Respondents could do whatever it wished to provide coverage, if it believed that doing so would terminate their liability. These seemingly contradictory statements by Sturm, taken in the context of his testimony, in fact establish that Sturm told Respondents that they could not purchase union medical coverage at less than current contract rates, and that if they sought to provide medical coverage for their employees elsewhere they could do so.

Thereafter, settlement discussions took place. On July 27, Tuchman wrote to Sturm rejecting his settlement proposal. Tuchman further stated that he believed that a further meeting would be helpful ''prior to an impasse being declared.'' Finally, Tuchman added that Respondents would begin making contributions at the current industry rate, effective July 1987.

On September 23, 1987, Tuchman sent to Sturm two checks issued by Holland House payable to the Union's Health Fund and Pension Fund. Tuchman's letter stated that the payments were for the ''J.R.R.'' employees at the current contract rates, for the period July 1, 1987 through September 30, 1987.

On October 16, Sturm wrote to Tuchman advising him that Section 302(c)(5) of the Taft Hartley Act prohibits a fund from accepting contributions from an employer in the absence of a written agreement setting forth the basis for the contribution. Sturm further stated that inasmuch as no written agreement exists between the Union and Holland House such payments could not be accepted.

Positions of the Parties

General Counsel argues that Holland House, being the successor to J.R.R., which continued the employing entity with notice of J.R.R.'s potential liability to remedy its unfair labor practices, is accordingly liable to remedy such violations. She further argues that the terms and conditions set forth in the 1979–1982 contract must be applied retroactively to the discharged and replacement employees. General Counsel asserts, with respect to contributions to the Pension and Health Funds required by the contract, that the contract's provisions require that such payments be made, not just for the 1979–1982 contract, but for the period from 1981 through the present. The Union joins in this argument, and in addition argues that liquidated damages for failure to make such payments must also be paid by Respondents for such time period.

Respondents argue that:

> (a) the Board's Order required a make whole remedy for the discriminatees and not their replacements.
>
> (b) they employed only 4 workers at any one time and therefore the Backpay Specification's claims for the 6 employees employed at the time of the finding of the violations is erroneous.
>
> (c) General Counsel has not claimed that any of the employees suffered any losses which should be compensated by payment to the Health Fund. Accordingly, Respondents need not make contributions to that Fund.
>
> (d) Holland House is not liable for the payment of any Fund contributions. Holland House is a successor to J.R.R. and not bound to any contract between the predecessor and the union. It could therefore unilaterally set the initial terms of employment for its employees. Holland House did not hire a majority of the predecessor's employees. Rather it ''found a workforce of replacements,'' and is not liable for the predecessor's unfair labor practices.
>
> (e) Holland House proffered contribution payments to the Union which were rejected. Accordingly, the Union waived payments from Holland House.
>
> (f) increases in the Fund contributions in subsequent contracts is improper.

Analysis and Discussion

The Board's Order in the underlying unfair labor practice case, enforced by the court of appeals, required that Respondent J.R.R. and its ''successors honor and give retroactive effect from April 1, 1981, to the terms and conditions of the collective bargaining contract with the Union, including payment of wages and benefits as prescribed.''

Respondent Holland House is such a successor. As set forth above, Respondents' answer admits that Holland House ''has continued to operate the business of Respondent J.R.R. in basically unchanged form . . . has continued the employ-

ing entity with notice of Respondent J.R.R.'s potential liability to remedy its unfair labor practices, and is a successor of J.R.R.''

The Supreme Court has held in *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973), that a successor which purchases a business with knowledge of its predecessor's unfair labor practices is liable to remedy such unfair labor practices. Holland House is such a successor. Its answer admits that prior to its acquisition of the property Holland House was on notice of J.R.R.'s potential liability in the underlying case through Chaim Babad who was a partner in J.R.R. and is the majority shareholder in Respondent Holland House. Accordingly, Holland House is responsible to remedy the violations committed by J.R.R, and is legally obliged to comply with the Board's Order against J.R.R. *Proxy Communications*, 290 NLRB 540, 544 (1988). The extent of its responsibility is the issue here.

Restoration of the Status Quo Ante—Generally

I reject Respondents' argument that as a successor under *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), Respondents were free to set the initial terms and conditions of employment for their employees. As stated in Respondents' brief, Respondent Holland House ''found'' a work force of employees and continued their employment. Its denial that it hired the predecessor's work force is not credited since it ''found'' and then hired and continued their employment. As such, Respondents were not free to set the initial terms and conditions of their employees. Respondents accordingly had an obligation to consult with the Union before setting terms of employment since it was ''perfectly clear'' that they intended to continue the employment of the employees they ''found.''

As the successor to J.R.R., Holland House is required to remedy the failure of J.R.R. to honor its collective-bargaining contract with the Union. This includes an obligation to pay the employees wages and benefits pursuant to the contract and to make contributions to the Union's pension and health funds. The extent and period of such payments and contributions, and the persons entitled to payments and contributions in their behalf are all in dispute.

J.R.R., of course, is required to remedy its unfair labor practices to the extent that it is able to do so at this time.

In *Golden State Bottling*, supra, the Court noted that the Act contemplated that the Board would exercise its remedial authority by ''striking a balance between the conflicting legitimate interests of the bona fide successor, the public, and the affected employee.'' 414 U.S. at 181. The Court quoted, with approval, the Board's language in *Perma Vinyl*, 164 NLRB 968 (1967), which emphasized the importance of protection of the victimized employees. As the Board found, and the court of Appeals enforced, J.R.R. repudiated its contract with the Union and refused to honor it, and made unilateral changes in the terms and conditions of employment of its employees.

It is not disputed that Holland House, as the successor to J.R.R., has similarly refused to honor the contract or remedy the unfair labor practices of J.R.R.

Where a respondent has made preimpasse unilateral changes in terms and conditions of employment, the Board will require that the status quo ante be restored. *Seascape Golf Course*, 294 NLRB 647 (1989); *Lehigh Portland Cement Co*., 286 NLRB 1366 (1987).

In order to remedy the unlawful refusal by J.R.R. to honor its contract with the Union, and the unilateral changes in employment conditions imposed by J.R.R., Respondents must restore the status quo ante to that which existed from April 1, 1981, when J.R.R. refused to honor its contract and unilaterally altered the terms and conditions of employment of the employees in the appropriate unit represented by the Union. Accordingly, Respondents are required to restore the terms and conditions of employment to those which existed on April 1, 1981, as set forth in the collective-bargaining agreement which was in effect at that time between J.R.R. and the Union. *Sahara Las Vegas Corp*., 284 NLRB 337 (1987).

Respondents argue that such restoration to the status quo ante improperly requires it to assume its predecessor's contract with the Union. The Supreme Court in *Burns* stated that a successor is not required to assume its predecessor's contract, rather its obligation consisted of being required to bargain with the union which represented its employees. Here, however, Holland House has an obligation, pursuant to *Golden State*, to remedy the violations committed by J.R.R. Such a remedy includes a duty to comply with the Board's Order, as enforced by the Second Circuit Court of Appeals, which required J.R.R. and its successors to ''honor and give retroactive effect to the terms and conditions of the collective bargaining contract with the Union, including payment of wages and benefits, as prescribed.'' Such a remedy is consistent with *Golden State*'s emphasis on protecting the employee victims of the unfair labor practices, *State Distributing Co*., 282 NLRB 1048 (1987), and is also appropriate where Holland House has continued to make unilateral changes in its employees' terms and conditions of employment without bargaining with the Union.[5] Moreover, it must be noted that a status quo ante remedy is particularly appropriate here where Chaim Babad, the main actor in the commission of the violations by J.R.R., is the majority shareholder in Holland House, and has continued to be the principal actor regarding the bargaining which has taken place concerning Holland House.

In addition to being required to continue giving effect to the expired contract with respect to wages and other benefits, Holland House is also required to make payments to the pension and health funds, as set forth in the contract. *Seascape*, supra; *Achilles Construction Co*., 290 NLRB 240 (1988); *Beitler-McKee Optica Co*., 287 NLRB 1311 (1988). In this respect, I reject Respondents' argument that they are not required to make payments to the health funds for contributions owed, but rather are responsible only for any claims which may have been made by employees. The Board rejected such a contention in *Achilles*, supra at fn. 12:

> In order to be made whole, however, a discriminatee must be restored to the position he would have occupied had the discrimination not occurred. This includes not only reimbursement of the discriminatee's premiums and medical expenses, but also requires the Respondent to contribute to the welfare fund according to the expired contract's terms so that the discriminatee's future interests in the Fund will be ensured. ''[T]he di-

[5] The ''bargaining'' which took place will be discussed, infra.

> version of contributions from the union funds undercut[s] the ability of those funds to provide for future needs.''

In this connection, Respondents' reliance on *Coletti Color Prints*, 204 NLRB 647 (1973), is misplaced. In that case, the Board held that the respondent was not required to make contributions to the union's funds because the Board's Order provided only for a make-whole remedy. Here, however, the Board's Order, in addition to a make-whole remedy, required that Respondents ''honor and give retroactive effect . . . to the terms and conditions of the collective-bargaining contract . . . including payment of . . . benefits as prescribed.''

Furthermore, Holland House will be required to continue giving effect to the expired 1979 contract with the Union, and make whole the employees and their replacements by remitting all wages and benefits that would have been paid absent the unilateral changes and repudiation of the contract, from April 1, 1981, until it negotiates in good faith with the Union to agreement or to impasse.

In this regard, Respondents assert that they have already bargained to impasse with the Union.

In *Sacramento Union*, 291 NLRB 552, 554 (1988), the Board discussed impasse, as follows:

> The Board has long held that an impasse occurs ''after good faith negotiations have exhausted the prospects of concluding an aqreement.''
>
> . . . .
>
> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

The bargaining which occurred consisted of a series of letters between the Respondents and the Union, and two brief meetings. In its letters, the Union sought to have Respondents restore the status quo ante by honoring the expired contract and making retroactive payments to employees, their replacements and the funds, and also sought information concerning the wages and benefits paid to their current employees.

At the 1-hour meeting on March 25, 1987, Union Attorney Sturm received part, but not all, the information he requested. Sturm stated that the purpose of the meeting was not to negotiate, but to discuss the restoration of the status quo ante. The conditions of employment of the current workers were discussed. The meeting ended when Sturm requested that Respondents notify him when they complied with the expired contract and remedied the unfair labor practices.

At the approximately 45-minute meeting on May 21, 1987, notwithstanding that it was the Union's position that it was not obligated to bargain until the conditions which existed prior to the commission of the unfair labor practices were restored, Sturm and Respondents discussed a prospective contract. Sturm offered 2 options to Respondents: that they accept the current standard contract or negotiate with the Union for a separate agreement. Respondents stated that they would negotiate for a new agreement, and the Union accepted that proposal, and at that meeting the Union made proposals for a new contract.

Also at that meeting, the parties discussed medical coverage for current workers and whether the coverage which Respondents desired could be purchased from the Union's Health Fund. Respondents offered to accept the standard agreement, with the major modification that the wages paid to the employees be less than those provided for in the standard agreement. The Union rejected that proposal and the meeting ended.

Under these circumstances, it can hardly be said that impasse has occurred. Respondents claim that the Union's rejection of their wage offer effectively created an impasse which could not be resolved. However, the Union's failure to agree to Respondents' wage offer was understandable. Respondents agreed to accept the standard industry agreement but refused to accept that agreement in toto. Accordingly, the Union was of the view, properly held, that if Respondents wished to accept the standard contract they should accept the entire agreement.

Moreover, in rejecting the Respondents' wage offer, Sturm did not say that the Union would never consider any modification in the standard contract's wage rate. ''Respondents could not justifiably conclude that the Union's position as then expressed was its final word on the subject.'' *D.C. Liquor Wholesalers*, 292 NLRB 1234, 1236 (1989).

Accordingly, based on the two brief meetings between the parties, the Union's unsuccessful attempts to have Respondents restore the status quo ante, and the way the negotiations were left, it is apparent that if any good-faith negotiations occurred, they have not ''exhausted the prospects of concluding an agreement.'' Respondents' good faith in offering to accept the standard contract, but not its wage rates is also questionable. It is clear, therefore, that impasse has not occurred. It cannot even be said that good-faith negotiations have occurred.

Restoration of the Status Quo Ante—To Whom and for What Period

General Counsel argues that wages and benefits, including contributions to the funds, are required to be paid in behalf of six employees, the number of people employed at the time of the commission of the unfair labor practices by J.R.R. Respondents assert that neither J.R.R. nor Holland House ever employed more than four employees at any one time, and that therefore, they should not be required to make contributions to any funds in behalf of more than four persons.

I agree with General Counsel. The Board found that at the time that J.R.R. purchased the building, six employees were employed there. The Board further found that J.R.R., by Babad, unlawfully discharged those six employees and instituted unilateral changes in the employment of their replacements. It would be grossly unfair to permit Respondents to profit by their wrongdoing, and to acquiesce in their unilateral change by employing fewer than six employees at the building. In addition, it should be noted that the contract between J.R.R. and the Union provided, in article X, paragraph 19, that if the Employer wished to reduce its force, it must provide the Union with 4 weeks' written notice of such intention. Such notice was not provided here and accordingly,

J.R.R. violated the terms of its contract by reducing its work force from six to some lesser number.

Accordingly, I will recommend that the Respondents be required to make contributions in behalf of six persons.

Respondents also note that the Board's remedy only covered the discharged employees, and not their replacements. They accordingly argue that payments of wages, benefits, or fund contributions cannot be ordered for the replacement employees. In *Ad-Art, Inc*, 290 NLRB 590, 591 (1988), the Board provided a make-whole remedy for employees who replaced unlawfully terminated employees. The Board stated:

> All replacements performing work that should have been performed under the applicable collective-bargaining agreements are entitled to be made whole for any losses they may have suffered by reason of the Respondents' failure and refusal to honor the agreements, including all contributions the Unions would have received in accordance with the agreements.

Accordingly, I will recommend that the remedy provided here will apply to the replacement employees who replaced the unlawfully terminated employees.

General Counsel further argues that, in addition to being required to make payments to the Union's Pension and Health Funds pursuant to the ''Apartment House Agreement''—the collective-bargaining contract which ran from April 21, 1979 through April 20, 1982 and which the Board found that J.R.R. had assumed, Respondents should also be required to pay the increases in those Funds as set forth in succeeding ''Commercial Building Agreements''—collective-bargaining contracts which ran from January 1981 through December 1983; January 1984 through December 1986; and January 1987 through December 1989.

General Counsel and the Union accordingly argue that Respondents' 1979 contract requires such increases in fund contributions during the backpay period.

The parties' 1979 contract at article X, paragraph (D)(2), states:

> Any contributions and benefits required hereunder shall be increased by any amount in the same manner as contributions and benefits may be increased in the 1981 Commercial Building Agreement (or its successor) between the Union and the RAB [Realty Advisory Board] and if service fees are required to be paid, the same fees shall be required to be paid hereunder.

In this regard, article VI, paragraph l(d) of the parties' 1979 contract is also instructive:

> Upon the expiration date of this agreement . . . [it] shall thereafter continue in full force and effect for an extended period until a successor agreement shall have been executed. During the extended period, all terms and conditions hereof shall be in effect . . . . During the extended period, the Employer shall negotiate for a successor agreement . . . .

Respondents, in their brief, concede that during the term of the parties' 1979 contract, they were aware that the 1981 commercial building agreement would be negotiated, and further conceded in the April 7, 1987 letter to the Union that the 1979 contract ''does provide that increases in the 1981 commercial [contract] or its successor shall reflect on the contributions for the contract.'' However, Respondent argues that the increase in contributions as set forth in the 1981 commercial contract cannot extend beyond April 20, 1982, the expiration date of the 1979 contract.

I agree, in part, with Respondent. The language of the 1979 contract, as argued by Respondent, contemplates that the increased contribution amounts are to be raised only as set forth in the 1981 commercial agreement or its successor. It is nowhere provided that increases set forth in the successor contracts to the 1981 contract would become the responsibility of Respondent. It is logical that, inasmuch as the parties were aware that the 1981 commercial agreement was being negotiated during the term of the 1979 contract, that increases in the fund amounts in that contract alone would be deemed to be a part of the 1979 apartment house agreement. The term the ''1981 commercial agreement or its successor'' means just that—that the increases in the funds set forth in the commercial agreement then being negotiated would be incorporated in the 1979 apartment house contract. The provision does not say the ''1981 commercial agreement and its successors,'' which is the interpretation given the term by General Counsel and the Union. Indeed, that interpretation, which would require Respondents to continue to pay whatever fund increases the Realty Advisory Board and the Union negotiate in future contracts would amount to making a new contract for the parties. Such an approach would violate the Supreme Court's holding in *H. K. Porter v. NLRB*, 397 U.S. 99 (1970), that the Board has no authoIity to compel agreement as to any substantive provision in a collective-bargaining contract.

Accordingly, I find that on the effective date of the 1981 commercial building agreement. Respondent became responsible for the increased amounts of fund contributions as set forth in that agreement. I further find that pursuant to their obligation to continue to pay fund contributions beyond the expiration date of the 1979 contract. Respondents continued to be liable and were required to continue to pay to the Funds such amounts of contributions as set forth in the 1981 commercial agreement. Such obligation to continue to make fund contributions continues from the effective date of the 1981 contract until Respondents restore the status quo ante. The contributions were and are required to be made on behalf of six persons, as set forth above.

I have considered that in September 1987 Respondents proffered certain amounts of fund contributions to the union funds which the union funds refused to accept. Respondents argue that this constitutes a waiver by the Union of any right it may have to be entitled to contributions past the expiration date of the 1979 contract. However, the contributions which Respondents sought to pay were contributions at the ''1987'' rates in order to provide coverage for their current employees. Union Attorney Sturm advised Respondents that the Fund was prohibited from accepting such contributions in the absence of a written agreement setting forth the basis for the contribution, and consequently such contributions would not be accepted. This refusal to accept the 1987 contributions for coverage at the ''current'' rates does not conflict with my findings here. Respondents simply sought current coverage without regard to the substantial amounts owed to the Fund by virtue of their failure to make contributions since 1981. This, the union attorney advised, could not be done. I note

that the Fund did accept contributions in April 1987 from Respondents, which it applied to amounts owed retroactively from 1981.

The Union also argues that Respondents be required to pay liquidated damages on the unlawfully withheld fund contributions, as assessed by the Funds against employers who are delinquent in making fund contributions. The General Counsel does not join in this argument, citing *Merryweather Optical*, 240 NLRB 1213, 1216 fn. 7 (1979).

The Union argues that inasmuch as Respondents were ordered to honor and retroactively apply the 1979 contract, all terms of that contract must be enforced. Article X, paragraph D(1), provides that:

> If the Employer fails to make required reports or payments to the Funds, the Trustees may in their sole and absolute discretion take any action necessary including but not limited to immediate arbitration and suits at law, to enforce such reports and payments, together with interest and liquidated damages as provided in the Funds' Trust Agreements, and any and all expenses of collection, including but not limited to counsel fees, arbitration costs and fees, court costs, auditors' fees and interest.

The Agreement and Declaration of Trust between the RAB and the Union which was in effect at the time of the 1979 contract, states as follows:

> The Trustees, in their sole and absolute discretion, may enforce the payment of Employer Contributions to the Trust Fund together with liquidated damages at the rate of one and one-half per cent per month for any contribution made more than 30, but less than 50 days after the date it first because due, such liquidated damages to be retroactive to tlle first date such contribution was due, and two and one-half per cent per month for any contribution received more than 50 days after the first day such contribution became due, such liquidated damages to be retroactive to the first date such contribution was due, any and all expenses of collection, including, but not limited to, audit fees, counsel fees, arbitration costs and fees and court costs, whether by utilizing arbitration procedures provided for in the collective bargaining agreements or otherwise.

The Board has reguarly provided for the payment of liquidated damages to certain funds where the trust agreements provide for liquidated damages. *Stone Boat Yard*, 276 NLRB 1185, 1188–1189 (1985); *G. T. Knight Co*., 268 NLRB 468, 469–470 (1983); *Peerless Roofing Co*., 217 NLRB 500, 504, 505 (1980).

Accordingly, I will include a recommendation that Respondents pay to the Funds additional sums representing liquidated damages, as set forth in the Trust Agreement.

Persons Entitled to Payment

Matters unresolved by the parties' agreement, as set forth in General Counsel's motion, include the following:[6]

(a) The claims of replacement employees for wages, holidays, vacation, birthdays, or sick pay for the period after January 1, 1989.

(b) The claim of employee Colin Wayneschloss, or the claims of any employees hired after January 1, 1989.

There was no evidence adduced at the hearing, which closed on December 6, 1988, as to who was employed after January 1, 1989. However, it appears that three people were employed at the time of the hearing: Peter Berisha, Albert Gordon, and Colin Wayneschloss. Berisha and Gordon testified at the hearing. Respondents' official Lichtenthal testified that Wayneschloss began his employment with Respondents in late 1987, replacing Neadson Holder. Lichtenthal further stated that Wayneschloss, who was employed at the time of the hearing, performs the same work as Peter Berisha and Albert Gordon.

In addition to Peter Berisha and Albert Gordon, the amended backpay specification lists the following as replacement employees:

(a) Dede ''David'' Berisha—He was last employed in March 1984, according to the specification.

(b) Zeff ''Joe'' Berisha—He was last employed in April 1982, according to the specification.

(c) Mark Berish—He was last employed in about 1982, according to the testimony of Peter Berisha.

(d) Neadson Holder—He was last employed in late 1987, according to the testimony of Lichtenthal.

(e) Anthony Falcone—There was no testimony concerning when he left Respondents' employ.

(f) Joseph Falcone—He was last employed in April 1985, according to the specification.

(g) Nadu Gegage—He was last employed in November 1984 according to the specification and was no longer employed at the time of the hearing, according to Peter Berisha's testimony.

(h) Kadrush Mahanti—He was last employed in August 1983, according to the specification.

Accordingly, it appears that Peter Berisha, Albert Gordon, and Colin Wayneschloss are the only replacement employees who were conceivably employed after January 1, 1989. Assuming that these individuals were employed after January 1, 1989, they would be entitled to the following sums.

In addition, any other employees who were hired after January 1, 1989, would also be entitled to the following.

Wages

The rider to the 1979–1982 collective-bargaining agreement provides that effective in April 1981, employees shall receive a minimum wage of $220 per week. Such sum represents $5.50 per hour for a 40-hour week. The contract states that the standard workweek consists of 40 hours. The wage rate of $5.50 per hour is the amount which was claimed in the backpay specification for Peter Berisha and Albert Gordon. Such rate of pay is also the amount required to be paid Wayneschloss.

Other replacement employees or other workers hired after January 1, 1989, are also entitled to be paid at the rate of S5.50 per hour.

[6] The other issue, discussed above, is the question of the contributions owed to the Building Service Local 32B-32J, Pension and Health Funds on behalf of the discriminatees and their replacements as alleged in amended appendix G, and appendices R and S of the amended backpay specification.

Inasmuch as there was no evidence as to (a) whether Berisha, Gordon, or Wayneschloss or any others were employed after January 1, 1989, or (b) how many hours they worked or (c) how much they received as wages, I am unable to compute the amounts owed. However, it is clear that any employees employed after January 1, 1989, were entitled to receive wages at the rate of $5.50 per hour.

Holidays

Pursuant to article X, paragraph 3, of the 1979–1982 contract, employees were entitled to receive their straight time pay for 10 enumerated holidays. In addition, any work required to be performed on the stated holidays must be paid for at time and one-half as holiday pay in addition to 8 hours' pay received for the holiday.

The holidays provided for in the contract are: New Year's Day, Lincoln's Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Election Day, Thanksgiving Day, and Christmas Day.

Any employees employed after January 1, 1989, are entitled to holiday pay at the contractual rates. Inasmuch as there is no evidence as to who was employed after January 1, 1989, or whether any of those persons worked on any holiday, it is not possible to compute the amount owed to specific persons.[7]

Vacation

According to article X, paragraph 10, of the 1979–1982 contract, employees employed from 1 to 4 years are entitled to 2 weeks' paid vacation, and employees employed from 5 to 14 years are entitled to 3 weeks' paid vacation.

Peter Berisha began his employment with Respondents in April 1981. Assuming that he was employed after January 1, 1989, he would have been employed for nearly 8 years, and would there be entitled to 3 weeks paid vacation as of January 1, 1989, the date set forth in General Counsel's motion. Inasmuch as Berisha's hourly rate is $5.50, and his weekly rate at 40 hours per week is $220, he is entitled to 3 weeks' paid vacation, or $660 for 1989.

Albert Gordon became employed by Respondents on November 16, 1984. Assuming that he was employed after January 1, 1989, he would have been employed for 4 years, 1-1/2 months as of January 1, 1989. He would therefore be entitled to receive 2 weeks' paid vacation in 1989. He would not be eligible to receive 3 weeks' paid vacation until November 1989, for the vacation period May 1 through September 15, 1990.

Accordingly, Albert Gordon was entitled to 2 weeks' paid vacation, or $440 for 1989.

Colin Wayneschloss was employed by Respondents in late, 1987. Assuming that he was employed after January 1, 1989, Wayneschloss was employed for more than 1 year, and is entitled to 2 weeks' paid vacation, or S440 for 1989.

With respect to other employees who may have been hired after January 1, 1989, the contract provides that employees who have worked from 6 months to 1 year are entitled to 3 days' paid vacation.

[7] It is alleged in the backpay specification that Peter Berisha worked 10 hours on the holidays. Assuming Berisha's continued employment after January 1, 1989, it is not known whether this alleged practice continued after that date.

Birthdays and Sickness Benefits

Article X, paragraphs 5 and 36, provide for payment for an employee's birthday and sickness benefits.

Generally, the contract provides that the employee's birthday shall be a paid day off.

Assuming that Peter Berisha, Albert Gordon, and Colin Wayneschloss were employed after January 1, 1989, they would all have been entitled to a paid day for their birthday. The amount of payment would be $44. In addition, any other employee hired after January 1, 1989, is entitled to a paid birthday.

In addition, the contract provides that a regular employee with at least 1 year of service shall receive 10 paid sick days per year. The contract further provides that employees who have worked the entire year without using all the sickness benefits, shall be paid in the succeeding January, 70 percent of a day's pay for each unused day, not to exceed 7 days' pay.

As to those employees employed after January 1, 1989, there is no evidence whether they were out sick during 1989 or were paid sickness benefits. Moreover, it will not be known until the end of 1989, whether they are entitled to the 70 percent amount for not using all their sickness benefits. Accordingly, I am unable to compute the amount of sickness benefits for any employees employed after January 1, 1989. Contributions due to the Pension and Health Funds as set forth above, I have found that Respondents are obligated to make contributions for six employees to the Local 32B-32J Pension Fund and the Local 32B-32J Health Fund from April 1, 1981, for contributions owed. I have further found that the 1979 Apartment House Agreement provides that any contributions and benefits required under that contract shall be increased by any amount as contributions may be increased in the 1981 Commercial Building Agreement. Inasmuch as that 1981 contract was in effect January 1, 1981, at a time when the unfair labor practices occurred (March 31, 1981), I find that the increases set forth in the 1981 agreement are properly incorporated in the 1979 Apartment House Contract, and those increases may properly be included in the amounts required to be contributed. I have also rejected the arguments of General Counsel and the Union that Respondents are required to pay the increases in contribution rates set forth in collective-bargaining agreements subsequent to the 1981 Commercial Building Agreement. Moreover, I have found, in agreement with the Union, that it is contractually entitled to the payment by Respondents of liquidated damages on the unpaid contributions to the Health and Pension Funds.

Concerning the rates of contributions to the Health Fund, the 1981 Commercial Building Agreement provides, in article XI, paragraph A, 2–3, that effective January 1, 1981, the employer shall contribute to the Fund $660 per year per employee. That contract further states that effective January 1, 1982, the employer shall contribute $712 per year per employee, and effective January 1, 1983, the employer shall contribute $816 per year per employee.

Concerning the rates of contributions to the Pension Fund, the 1981 Commercial Building Agreement provides, in article X, paragraph B, 2, that effective January 1, 1981, the employer shall contribute to the Fund $11 per week per employee. The contract further states that effective January 1, 1982, the employer shall contribute $12 per week per employee.

With respect to the amounts of liquidated damages required to be paid to the Union's funds, the Health and Pension Funds Trust Agreements provide, as set forth above, that if contributions are more than 50 days late, a charge of 2.5 percent per month is applied to the unpaid principal. That charge is retroactive to the first date the contribution was due.

Year	*Qtr.*	*H.F. Cont.*	*H.F.L.D.*	*P.F. Cont.*	*P.F.L.D.*[8]	*Percent*
1981	2	[9] $ 990.00	$2,301.75	[10] $858.00	$1,994.85	232.5
	3	990.00	2,227.50	858.00	1,930.50	225.0
	4	990.00	2,153.25	858.00	1,866.15	217.5
1982	1	[11] 1,068.00	2,242.80	[12] 936.00	1,965.60	210.0
	2	1,068.00	2,162.70	936.00	1,895.40	202.5
	3	1,068.00	2,082.60	936.00	1,825.20	195.0
	4	1,068.00	1,997.16	936.00	1,755.00	187.5
1983	1	[13] 1,224.00	2,203.20	936.00	1,684.80	180.0
	2	1,224.00	2,111.40	936.00	1,614.60	172.5
	3	1,224.00	2,019.60	936.00	1,544.40	165.0
	4	1,224.00	1,927.80	936.00	1,474.20	157.5
1984	1	1,224.00	1,836.00	936.00	1,404.00	150.0
	2	1,224.00	1,744.20	936.00	1,333.80	142.5
	3	1,224.00	1,652.40	936.00	1,263.60	135.0
	4	1,224.00	1,560.60	936.00	1,193.40	127.5
1985	1	1,224.00	1,468.80	936.00	1,123.20	120.0
	2	1,224.00	1,377.00	936.00	1,053.00	112.5
	3	1,224.00	1,285.20	936.00	982.80	105.0
	4	1,224.00	1,193.40	936.00	912.60	97.5
		$2,1930.00	$35,547.36	$17,550.00	$28,817.10	
1986	1	1,224.00	1,101.60	936.00	842.40	90.0
	2	1,224.00	1,009.80	936.00	772.20	82.5
	3	1,224.00	918.00	936.00	702.00	75.0
	4	1,224.00	826.20	936.00	631.80	67.5
1987	1	1,224.00	734.40	936.00	561.60	60.0
	2	1,224.00	642.60	936.00	491.40	52.5
	3	1,224.00	550.80	936.00	421.20	45.0
	4	1,224.00	459.00	936.00	351.00	37.5
1988	1	1,224.00	367.20	936.00	280.80	30.0
	2	1,224.00	275.40	936.00	210.60	22.5
	3	1,224.00	183.60	936.00	140.40	15.0
	4	1,224.00	91.80	936.00	70.20	7.5
		$14,688.00	$7,160.40	$71,232.00	$5,475.60	

[8] These figures constitute contributions for six positions.
The abbreviations are as follows:
H.F. Cont.—Health Fund Contributions
L.D.—Liquidated Damages
P.F. Cont.— Pension Fund Contributions

[9] The 1981 Health Fund Contributions are computed as follows:
The 1981 Commercial Building Agreement requires contributions of $660 per year per employee, effective January 1, 1981. The quarterly amount is
$165 per employee. $165 times six positions equals $990.

[10] The 1981 Pension Fund Contributions are computed as follows:
The 1981 Commercial Building Agreement requires contributions of $11 per week per employee effective January 1, 1981. Eleven dollars per week
times 6 positions times 13 weeks per quarter equals $858.

[11] The Health Fund contributions were increased to $712, effective January 1, 1982.

[12] The Pension Fund contributions were increased to $12, effective January 1, 1982.

[13] The health contributions were increased to $816 effective January 1, 1983.

Thus, the period from April 1, 1981, the date set forth in the Board's decision as the date beginning which Respondents were required to honor the contract, to December 31, 1988, comprises 93 months. For example, for the first quarter in which the contributions were due, April 1, 1981 (the second quarter of 1981), the Health Fund contributions, of $990 has been unpaid for 93 months. Ninety-three months times 2.5 percent per month is 232.5 percent. The sum of $990 times 232.5 percent equals $2301.75. That amount represents the Health Fund liquidated damages. For each succeeding quarter, the number of months multiplied by 2.5 percent is reduced by 3. The same formula has been used to compute the Pension Fund liquidated damages.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The Respondents, Chaim Babad, Bernard Steinmetz and Emanuel Steinmetz, a co-partnership d/b/a J.R.R. Realty Co., and Holland House Tenants Corporation, Additional Respondent, Forest Hills, New York, their officers, agents, successors, and assigns, shall

1. Make whole each of the employees who were employed on and after April 1, 1981, at the building located at 73-37 Austin Street, Forest Hills, New York, now known as Holland House, by paying such employees (replacement employees in this Supplemental Decision) such sums of money plus interest[15] which they are entitled to for wages, holidays, vacation, birthdays and sickness benefits, as set forth in this Supplemental Decision, for the period after January 1, 1989.

2. Pay to the Local 32B-32J Pension Fund the sum of $123,074.70 plus interest which represents the amount owed from April 1, 1981, to December 31, 1988. Pay to the the Local 32B-32J Health Fund the sum of $79.325.76 plus interest which represents the amount owed from April 1, 1981, to December 31, 1988.

3. Honor and give effect to the terms and conditions of the collective-bargaining agreement with Local 32B-32J, Service Employees International Union, AFL–CIO, as ordered by the Board and enforced by the Second Circuit Court of Appeals.

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[15] Interest on and after January 1, 1987, shall be computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Interest on amounts accrued prior to January 1, 1987, shall be computed in accordance with *Florida Steel Corp*., 231 NLRB 651.